Supreme Court, U.S.
FILED
MAR 17 2000
CLERK

(3)

No. 99-971

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN CHERNA
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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13 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Petitioner's Reply Brief 1

Preliminary Statement 1

The McGrew Conflict 1

Other Conflicts 6

The Lo-Ji Sales Exception 8

Probable Cause 8

Sheppard 10

Conclusion 10

TABLE OF AUTHORITIES

Page

Center Art Galleries - Hawaii v. United States,
875 F.2d 747 (9th Cir. 1989) 3

Durland v. United States,
161 U.S. 306, (1896) 4

In re Matter of Seizure of Property Belonging to Talk of the Town Bookstore, Inc.,
644 F.2d 1317(9th Cir. 1981) 3

Massachusetts v. Sheppard,
468 U.S. 981 (1984) 10

McNally v. United States,
483 U.S. 350, (1987) 4

United States v. McGrew,
122 F.3d 847 (9th Cir. 1997) 1,2,3,4,5,10

United States v. Shugart,
117 F.3d 838 (5th Cir. 1997) 5

United States v. Spilotro,
800 F.2d 959 (9th Cir. 1989) 3

United States v. Towne,
997 F.2d 537 (9th Cir. 1993) 3

Wyoming v. Houghton,
526 U.S. 295, (1999) 9

Zurcher v. Stanford Daily,
436 U.S. 547, (1978) 9

PETITIONER'S REPLY BRIEF

Petitioner Marvin Cherna files the following Reply Brief in response to the "Brief in Opposition of the United States."

Preliminary Statement:

At the outset, Petitioner notes that the Government misperceives the nature of his challenge to the Warrant. It characterizes Petitioner's challenge in a limiting way: "Petitioner's major challenge (Pet. 19-25) to the particularity of the warrant is that it authorized a seizure of all of his *business records* in a search to be conducted at his house." *Resp.*, p. 15 n. 4 (emphasis added). Not true. Petitioner submits that the Warrant allowed agents of the federal government to search for and seize *any tangible item* located on the premises that served as his residence/place of business. This Warrant literally imposed no limits on the seizure of any tangible item, whether business or personal. That is Petitioner's claim.

The McGrew Conflict:

In *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), the Ninth Circuit concluded that an affidavit that was not served with the warrant could not be used to cure a particularity defect on the face of the warrant and that the good faith exception could not, as a matter of law, shield the fruits of the search from suppression. Petitioner contends that the Fifth Circuit's resolution of his case is in direct conflict with *McGrew* for several reasons:

1. In both cases, the Government attempted to rely on an affidavit tendered in support of the issuance of a search warrant to establish the warrant's particularity;
2. In both cases, the affidavit was referenced in the body of the warrant, but was not attached to the warrant;
3. In both cases, the person who resided at the target premises was never served with or shown a copy of the affidavit because the affidavit was under seal; and

4. In both cases, the Government urged the Court to salvage the fruits of the search and seizure by invoking the good faith exception to the exclusionary rule.

The Government sees no conflict with *McGrew*. *Resp.*, pp. 9-11. In its efforts to distinguish *McGrew*, the Government advances several arguments that are simply incorrect. First, contrary to the Government's unsupported assertion, there is no evidence that the Smitherman Affidavit was ever "attached to the Warrant." *Resp.*, p. 10. All of the testimony in the record is exactly to the contrary. The Smitherman Affidavit was separately sealed and was neither attached to nor served with the Warrant. Indeed, while the Warrant does refer to the Smitherman Affidavit, it does not expressly incorporate it by reference or otherwise indicate that physical attachment was even contemplated. *App. D, p. 33a.*

Second, the Government concludes that the *McGrew* case is different because the Court in that case premised its rejection of the good faith exception to the exclusionary rule "in substantial part" on the fact that the Ninth Circuit adheres to a rule requiring actual physical attachment of the affidavit to the warrant as a prerequisite to allowing the affidavit to cure a particularity defect. *Resp.*, p. 11 (emphasis added). To the contrary, the *McGrew* Court clearly stated that it was applying the "accompanying" test – not the physical attachment test:

> "The well settled law of this circuit states that a 'search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) *the affidavit accompanies the warrant*, and . . ." *McGrew*, 122 F.3d at p. 849 (emphasis added).[1]

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[1] Footnote 5 of the *McGrew* opinion does refer to actual "attachment" of the affidavit to the warrant. The apparent

It reiterated its reliance on the "accompanied" standard at a later point in the opinion: "If the 'incorporated' affidavit does not *accompany* the warrant, agents cannot claim good faith reliance on the affidavit's contents." *McGrew*, 122 F.3d at p. 850 (emphasis added). Thus, the result in *McGrew* is clearly not attributable solely to a nuance in Ninth Circuit law.[2]

Third, the Government suggests that the *McGrew* Court attached some significance to the fact that there was no evidence that the agents who participated in the search were "aware of the contents of the affidavit." *Resp.*, pp. 9-10. To the contrary, the pivotal issue was not whether the agents themselves were aware of the contents of the curative affidavit, but, instead, whether the owner of the target residence had received a copy of the affidavit:

> "The agents must either serve the affidavit with the warrant or list with particularity its relevant

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inconsistency between the footnote and the text simply reflects the fact that the Ninth Circuit has been as erratic as the Fifth in its treatment of when an affidavit can be used to cure a warrant's lack of particularity. Some Ninth Circuit cases suggest that physical attachment is required. *Center Art Galleries – Hawaii v. United States*, 875 F.2d 747 (9th Cir. 1989); *United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1989). Others hold that physical attachment is unnecessary if the affidavit accompanies the warrant. *See, e.g. United States v. Barkacs*, No. 90-10240 (9th Cir. 9/22/99 – unpublished); United *States v. Towne*, 997 F.2d 537 (9th Cir. 1993); *In re Matter of Seizure of Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F.2d 1317, 1318-19 (9th Cir. 1981).

[2] Even if the different results in *McGrew* and *Cherna* could be explained solely by referencing the different requirements in each Circuit for relying on an affidavit to cure a lack of particularity, why should this Court condone different rules in different Circuits? After all, Texas citizens are protected by the same Fourth Amendment that protects citizens of California.

> directives on the warrant itself. Otherwise, the good faith exception is not available because . . . *no matter how aware the officers are of the limits of their search*, the person being searched . . . is still completely unaided when agents fail to produce a document explaining the parameters of the search." 122 F.3d at 850, n. 5 (emphasis added).

Fourth, the Government finds a distinction in the fact that the *McGrew* warrant made no reference to the type of criminal activity suspected or to the type of items the officers were authorized to seize. *Resp., p. 9.* However, all that the Warrant in the case *sub judice* explained about the nature of the crime was that it somehow involved mail fraud or wire fraud as allegedly described in the Smitherman Affidavit. A warrant's conclusory reference to the crimes of mail fraud and wire fraud adds nothing to its particularity. After all, the federal statutes criminalizing mail fraud and wire fraud encompass any "scheme or artifice to defraud." Thus, their scope is as broad as the imagination of those who perpetrate scams and swindles. *See, e.g., McNally v. United States*, 483 U.S. 350, (1987); *Durland v. United States*, 161 U.S. 306, (1896).

It is telling that the Government itself points to the Smitherman Affidavit as the document that defines the crimes under investigation. *Resp.*, p. 10, n. 1. In essence, the Government concedes that, just as in *McGrew*, the nature of the criminal scheme the Government purported to investigate under the Warrant is revealed only through resort to the missing Smitherman Affidavit.[3]

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[3] There is one distinction between this case and *McGrew*, but that distinction makes the case for suppression here even more compelling than in *McGrew*. In *McGrew*, the affidavit apparently did describe the suspected crime and the items subject to seizure. Here, in contrast, even if the Smitherman Affidavit had been attached to and incorporated into the Warrant, it would not have restricted either the scope of the search or the items subject to

Finally, the Government attempts to distinguish the Warrant here from the one declared invalid in *McGrew* on the ground that this Warrant listed 26 categories of items that were subject to seizure if the executing officers concluded that they "related" to the mail and wire fraud offenses described in the missing Smitherman Affidavit. *Resp.*, p. 10. In advancing this argument, the Government asks the Court to ignore two significant features of the Warrant. First, as described in the Petition, the 26 "specific categories" that the Government relies on are, in fact, far from "specific." Indeed, the Fifth Circuit itself – writing only one year before Cherna's case was decided – condemned as unconstitutional a warrant containing more narrowly-tailored categories than the 26 categories listed in the Warrant here. *United States v. Shugart*, 117 F.3d 838, 844 (5th Cir. 1997).[4]

Second, the Government asks the Court to ignore the broad all encompassing language - "including, but not limited to" – that precedes the 26 categories. It concludes that *Andresen v. Maryland*, 427 U.S. 463 (1976) and its progeny stand for the proposition that such language does not render the Warrant a general warrant. That, however, is not what *Andresen* says. In *Andresen*, the catch-all language in the warrant appeared *after* a specific laundry list of items. The Court simply applied a standard rule of construction to conclude that the scope of the general language appearing at the tail end of the laundry list was

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seizure. *Pet., pp. 2-3.* Quite simply, the Smitherman Affidavit did not supply particularity at all. Indeed, the Smitherman Affidavit revealed that all items located on the target premises would be subject to seizure.

[4] Thus, the Fifth Circuit's own *Shugart* precedent would have alerted any objectively reasonable government official involved in the preparation of the Warrant that the final product was, in fact, an unconstitutional general Warrant.

circumscribed by the specific categories that appeared before it. Here, in contrast, the catch-all language *precedes* the laundry list and specifically recites that the list is not to be construed as limiting. Thus, this case is the converse of *Andresen*.

Other Conflicts:

The Government ignores the direct conflict among the Circuits over the question whether an affidavit must be physically attached to the warrant before it is permitted to supply constitutionally-mandated particularity. As described in the Petition, the Circuits are in disarray over this issue – there are stark inter- and intra- Circuit conflicts on what is required before an affidavit may cure a particularity defect. *Pet.*, pp. 15-17.

Citing the Fifth Circuit's reliance on the good faith exception, the Government pretends that there are no conflicts for the Court to resolve:

> "Moreover, because the Court of Appeals did not rule on the substantive validity of the warrant, its decision could not conflict with any of the various decisions cited by Petitioner for the proposition that the warrant was invalid." *Resp.*, p.16 (emphasis added).[5]

In *United States v. Leon*, 468 U.S. 897 (1984) this Court expressed the view that the good faith exception would not "deny needed guidance from the courts, or freeze Fourth Amendment law in its present state." 468 U.S. at 924. As indicated by the above-

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[5] Petitioner respectfully submits that the Government's avoidance analysis inevitably leads to the conclusion that this Court should countenance the application of different constitutional standards to citizens in states located in different Circuits. This type of thinking flies in the face of the accepted principle that the Constitution acts directly on every citizen regardless of state citizenship or geographical location.

quoted passage, however, the Government urges the Court to invoke the good faith exception to avoid resolving important issues of Fourth Amendment jurisprudence. Thus, the Government urges the Court to bypass the important question whether an all records (or, in this case, all tangible items) warrant is consistent with the Fourth Amendment and, if so, the proper standard of probable cause required to support the issuance of such a warrant. Likewise, the Government uses the good faith rationale to urge the Court to avoid delving into the clear inter- and intra- Circuit conflicts over the question whether an affidavit that is not attached to a warrant can supply constitutionally-mandated particularity. *Resp.*, pp. 14-15.

Given the exceptions to the "good faith" rule that this Court recognized in *Leon*, it is difficult to understand how any court can resolve the "good faith" issue without addressing the constitutional validity of the warrant itself where, as in this case, the warrant under scrutiny is facially invalid.[6] Petitioner respectfully submits that the Court should not accept the Government's invitation to leave Fourth Amendment jurisprudence in disarray simply because

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[6] This case, however, illustrates that the good faith exception can be utilized to mask or defer the resolution of serious conflicts over Fourth Amendment principles. Here, the Fifth Circuit cited its own intra-Circuit conflict over the question whether a supporting affidavit must be physically attached to a search warrant before it can supply particularity as a basis for concluding that the officers acted in good faith. *United States v. Cherna*, 184 F.3d 403, 412-413 (5th Cir. 1999). Importantly, although it expressly acknowledged that its own cases were in conflict, the Fifth Circuit failed to resolve that conflict. This, of course, means that law enforcement officials in the Fifth Circuit are free to choose the Fourth Amendment rule that they prefer to follow, knowing that courts within the Circuit will refuse to suppress by using the unresolved intra-Circuit conflict to support a claim of good faith.

some of the issues relating to the validity of the Warrant were addressed by the lower courts in the context of good faith.

The Lo-Ji Sales Exception:

Petitioner adheres to his contention that the rule in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) is applicable here, and that the good faith exception to the exclusionary rule is therefore inapplicable. The Fourth Amendment demands that a neutral and detached magistrate stand between the police and the target of the search Warrant. The magistrate's function is to determine the existence of probable cause and to ensure that the scope of the requested search is sufficiently particularized as mandated by the language of the Fourth Amendment. The probable cause and particularity requirements are interrelated, for probable cause is necessarily determined in relation to the items that the government seeks authority to seize. *Infra,* p. 9.

Where, as in this case, a magistrate issues a blank check to the authorities allowing the latter to roam at will throughout the target residence, and to seize whatever they unilaterally determine to be "related to" the amorphous crimes of mail fraud and wire fraud, then it is clear that the magistrate has not performed the function assigned to him by the Constitution. A magistrate who cedes to the executing officers the authority to determine the scope of their search and seizure has just as completely relinquished his constitutional role as the magistrate in *Lo-Ji Sales*.

Probable Cause:

For the most part, the Government avoids addressing the important question of the standard of probable cause that must be satisfied to justify the issuance of an all records (or all items) search warrant. Instead, it invites the Court to sidestep that important issue, arguing that the Fifth Circuit's ruling is premised solely on the good faith exception, and, therefore, the Court should not delve into substantive Fourth Amendment issues like probable cause. *Resp.*, pp. 15-16. For the reasons described above, the Government's rationale has the Court ceding control of the

development of substantive Fourth Amendment jurisprudence to the lower federal courts, and should be rejected on that ground alone.

More importantly, a palpable lack of probable cause is one of the four circumstances the Court specifically identified in *Leon* where the exclusionary rule would continue to operate. Thus, the evident absence of probable cause is always an appropriate consideration - even where the sole question is one of good faith. Indeed, contrary to what the Government implies, the Fifth Circuit specifically addressed probable cause in the course of conducting its good faith analysis. *App. A, pp. 9a-12a.* Thus, the issue is certainly before the Court.

The Government's only direct response to Petitioner's argument that probable cause to support issuance of an all records warrant was never established is contained in footnote 5 of its Response. There, the Government asserts that the Smitherman Affidavit supplied "probable cause to believe that petitioner's charities had engaged in fraud." *Resp., p. 15, n. 5.* Clearly, the Government has misconstrued the probable cause issue. The issue is not whether there might have been probable cause to support a limited, particularized search for evidence of fraud. The question Petitioner raises is whether anything in the Smitherman Affidavit established probable cause for the issuance of an unlimited all records warrant that literally authorized the executing agents to seize any tangible item located on the premises which served as Petitioner's residence/place of business.

This Court has explained that the determination of probable cause in the context of a search warrant centers on two questions: (i) whether "there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought"; and (ii) whether "the items will be found in the place to be searched." *Zurcher v. Stanford Daily, 436 U.S. 547, 556–557, n. 6 (1978); see also, Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297, 1301 (1999).* Petitioner notes that this Court has never addressed whether an all records/all items warrant is constitutional and, if so, the standard of probable cause that must

be satisfied to justify the issuance of such a warrant. Petitioner contends that such all-encompassing warrants directed at a person's residence should, if constitutional at all, at the very least require a more substantial showing than the one Agent Smitherman made in this case. To allow the unrestrained invasion of an individual citizen's home and the seizure of all of his business and personal effects on the basis of the Smitherman Affidavit flies in the face of the values that the Fourth Amendment was designed to protect. The wholesale abandonment of those values by the Fifth Circuit should not be countenanced by this Court.

Sheppard:

In its discussion of *Massachusetts v. Sheppard*, 468 U.S. 981(1984), the Government claims that Petitioner mischaracterized Agent Smitherman's testimony. *Resp.*, p. 13. To the contrary, Petitioner quoted it. *Pet.*, pp 27-28. No objective reading of the transcript of the suppression hearing (whether in whole or in part) would lead the reader to conclude that Agent Smitherman acted in anything but a deliberate manner in securing the general warrant that is at the heart of this case.

CONCLUSION

The Warrant here was an obvious unconstitutional general warrant. The Fifth Circuit's conclusion that the officers who secured and executed the Warrant acted in objective good faith conflicts with the Ninth Circuit's reasoning in *McGrew* and, more importantly, represents a complete abandonment of the principles at the core of the Fourth Amendment. For these reasons and the other reasons set out above and in his Petition for a Writ of Certiorari, Petitioner respectfully requests that the Court issue a writ of certiorari to resolve the important issues of constitutional law that this case presents.

March 16, 2000.